Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RICHARD KENYON, Plaintiff, vs. STATE OF IOWA and HONORABLE GARY WENELL, Defendants.	No. C 03-4038-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION TO DISMISS**

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In this action, filed May 12, 2003, plaintiff Richard Kenyon, the former Clerk of Court for Plymouth County, Iowa, asserts claims arising from his discharge from that position against the State of Iowa and the Honorable Gary Wenell, Judge of the Iowa District Court. Kenyon's first claim, pursuant to 42 U.S.C. § 1983, alleges violation of his federal constitutional rights to procedural and substantive due process. His second claim, pursuant to the Iowa Tort Claims Act, IOWA CODE CH. 669, alleges wrongful discharge in violation of rights and procedures governing employees of the Iowa Judicial Branch set forth in IOWA CODE CH. 602. This matter comes before the court pursuant to the defendants' July 28, 2003, Motion To Dismiss (docket no. 8). Kenyon resisted the defendants' Motion To Dismiss on August 19, 2003 (docket no. 10). The court heard oral arguments on the defendants' Motion To Dismiss on September 29, 2003. At the oral arguments, plaintiff Richard Kenyon was represented by Dewey P. Sloan, Jr., of Dewey P. Sloan, Jr., P.C., in Le Mars, Iowa. Defendants State of Iowa and Judge Wenell were represented by Grant K. Dugdale, Assistant Iowa Attorney General, in Des Moines, Iowa. This matter is now fully submitted.

I. INTRODUCTION

A. Factual Background

On a motion to dismiss, the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the following factual background is drawn from

plaintiff Kenyon's Complaint. However, the court will not recount here all of Kenyon's factual allegations, but only sufficient of them to put in context the defendants' motion to dismiss and Kenyon's resistance to that motion.

Plaintiff Kenyon was originally elected Clerk of Court for Plymouth County, Iowa, on January 1, 1985. On January 1, 1989, the position of Clerk of Court became appointive, rather than elective, but Kenyon continued in that position as the appointee of the Judges of Iowa's Third Judicial District pursuant to IOWA CODE § 602.1215. Kenyon alleges that he served subject to the conditions set forth in IOWA CODE §§ 602.1215 and 602.1218, the Iowa Supervisory Manual for the Judicial Branch, and the Iowa Personnel Manual for the Judicial Branch, which provide, generally, only for removal for cause.

Kenyon alleges that, in about 1993, defendant Gary Wenell, a Judge of the Iowa District Court, became the presiding judge for Plymouth County, and hence Kenyon's immediate supervisor. Prior to that time, Kenyon alleges that there had never been any complaints about his conduct. However, on August 22, 2001, Kenyon received a notice of hearing concerning seven allegations of misconduct by him during approximately the preceding ten-year period. Kenyon did not attach a copy of the notice of hearing to his Complaint and has not specified what the alleged incidents of misconduct were. The hearing, which was held on September 7, 2001, before all seven district judges of Iowa Judicial District 3B, lasted two-and-one-half hours. Kenyon alleges that, during the hearing, several incidents that were not in his personnel files were brought up and that the conduct of the judges indicated that the hearing was never intended to be fair, but was merely a formality to confirm a pre-determined outcome. Following the hearing, Kenyon received a letter dated September 14, 2001, terminating Kenyon's employment pursuant to IOWA CODE §§ 602.1215 and 602.1218. However, Kenyon asserts that the letter did not reference either the Iowa Supervisory Manual for the Judicial Branch or the Iowa

Personnel Manual for the Judicial Branch, nor did it identify any specific misconduct by Kenyon justifying his removal. Kenyon has not attached a copy of the termination letter to his Complaint, either.

Upon his termination, Kenyon alleges that the Court Administrator had him escorted from the Plymouth County Courthouse by deputies of the Plymouth County Sheriff's Department, which caused him great humiliation. He also alleges that he was unable to find comparable employment in this area and he was, therefore, eventually forced to move with his family to Kansas City to obtain employment at a substantially reduced wage.

Kenyon's grievances to the State of Iowa and pursuit of administrative remedies under the Iowa Tort Claims Act failed to overturn his discharge. This lawsuit followed.

B. Procedural Background

As mentioned above, on May 12, 2003, Kenyon filed a Complaint asserting claims arising from his discharge. In Count I of his Complaint, Kenyon asserts a claim, pursuant to 42 U.S.C. § 1983, that the State of Iowa and Judge Wenell were state actors acting under color of state law, and that these defendants, while serving as his employers, violated his federal constitutional rights in discharging him in the following respects: (1) they violated Kenyon's right to procedural due process by failing to consider material presented by Kenyon at his termination hearing; and (2) they violated his rights to procedural and substantive due process by failing to follow the statutory guidelines for his termination as set forth in IOWA CODE §§ 602.1215 and 602.1218 and the pertinent supervisory and personnel manuals. Kenyon alleges, further, that the State of Iowa has intentionally attempted to circumvent his statutory rights and rights under pertinent manuals to removal only for cause by attempting to carve out an exemption for "at-will, appointed officials," in violation of his substantive and procedural due process rights. As

a result of this wrongful conduct, Kenyon alleges that he has suffered and will continue to suffer pain and suffering and economic loss, including the loss of earnings, employment benefits, and job opportunities. He, therefore, seeks compensatory damages, prejudgment interest, and other remedies as determined by the court.

In Count II of his Complaint, Kenyon asserts a claim of removal in violation of the standards and procedures set forth in IOWA CODE §§ 602.1215 and 602.1218. More specifically, in this count, Kenyon alleges that he was never notified of the specific cause for his removal and never notified of the extent of any conferencing or voting for his removal by the judges, and that, instead, the decision to terminate him had been made before his termination hearing. He also alleges that the defendants failed to follow the procedures set forth in the pertinent supervisory and personnel manuals. Therefore, Kenyon contends that his termination violated public policy as well as statutory and contractual rights afforded by the State of Iowa. Kenyon again alleges that the defendants' misconduct caused him economic damage and pain and suffering, for which he seeks compensatory damages and prejudgment interest.

The defendants waived personal service of Kenyon's Complaint on June 19, 2003. On July 21, 2003, the defendants moved for an extension of time to file a motion to dismiss, to which Kenyon objected. However, the court granted the extension to and including July 25, 2003. On July 28, 2003, the defendants filed the Motion To Dismiss presently before the court, which bears a certificate of service on July 25, 2003. In essence, the Motion To Dismiss asserts that the defendants have Eleventh Amendment immunity to Kenyon's claims and that he has failed to join necessary and indispensable parties. Kenyon resisted the defendants' motion on August 19, 2003, and, with the oral arguments on September 29, 2003, the defendants' Motion To Dismiss was fully submitted.

II. LEGAL ANALYSIS

A. Standards For A Motion To Dismiss

The defendants' Motion To Dismiss is pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides that, by pre-answer motion, a defendant may move to dismiss a complaint or claim for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The issue on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is not whether a plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence in support of his or her claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989). In considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "A motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (internal quotation marks and ellipses omitted); *accord Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997) (also considering whether there is an "insuperable bar to relief" on the claim). The court will apply these standards to the defendants' Motion To Dismiss the claims asserted by Kenyon, considering each claim in turn.

B. Kenyon's § 1983 Claim

The defendants make two challenges to Kenyon's § 1983 claim: (1) that the claim is barred by the defendants' Eleventh Amendment or "sovereign" immunity; and (2) the claim fails, because Kenyon has failed to join necessary or indispensable parties. The court will consider these challenges in turn.

1. Eleventh Amendment challenge

a. Arguments of the parties

The defendants contend, first, that Count I of Kenyon's Complaint, the § 1983 claim, should be dismissed, because the State of Iowa and Judge Wenell, who the defendants contend has been sued in his official capacity, have immunity to such a suit, not merely to liability, under the Eleventh Amendment to the United States Constitution. Somewhat more specifically, they argue that, as a state and a state official sued in his official capacity, respectively, they are not "persons" within the meaning of § 1983. Next, they argue that the Eleventh Amendment bars Kenyon's claim, because it bars suits by a citizen of a state against that state or a state official in his or her official capacity. They also argue that Kenyon's suit is precisely the kind of "suit" that is barred by the Eleventh Amendment, because any judgment on the § 1983 claim would expend public money, interfere with public administration, and restrain the state from acting or compel it to act. Finally, they argue that Kenyon's suit does not fall within an exception to Eleventh Amendment immunity, because that immunity has not been abrogated or waived.

Kenyon argues, however, that § 1983 is a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, to which states are subject. He argues, further, that the United States Supreme Court has recognized that public employees who can be dismissed only "for cause" may have a property interest in their employment to which due process rights apply, so that his suit may proceed against the State of Iowa. Kenyon also asserts that, contrary to the defendants' assertions, he is suing Judge Wenell in his individual or administrative capacity as an "employer," not in his official capacity as a judge. Therefore, he contends that Judge Wenell has no Eleventh Amendment immunity to his § 1983 claim arising from the violation of his due process rights in his termination.

b. Nature of Kenyon's claim

Both Kenyon and the defendants have, at times, referred to Kenyon's first claim as a claim that the defendants "violated § 1983." However, on its own, 42 U.S.C. § 1983 provides no substantive rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Therefore, "[o]ne cannot go into court and claim 'a violation of § 1983,' for § 1983 by itself does not protect anyone against anything, but simply provides a remedy." *Id.* at 600, 99 S. Ct. 1905; *accord Albright v. Oliver*, 510 U.S. 266, 270 (1994). ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'") (per Chief Justice Rehnquist, with three Justices joining, two Justices concurring, and two Justices concurring in judgment) (quoting *Baker v. McCollan,* 443 U.S. 137, 144, n. 3 (1979)); *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980) (discussing the remedial nature of § 1983 and stating, "[c]onstitution and laws" means that § 1983 provides remedies for violations of rights created by federal statute, as well as those created by the Constitution); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 685 (1978) (§ 1983 was designed to provide a "broad remedy for violations of federally protected civil rights"). Nevertheless, it appears from Kenyon's Complaint that the essence of his § 1983 claim is actually violation of his federal constitutional rights to procedural and substantive due process. Thus, Kenyon's claim in Count I is a claim *pursuant to § 1983* alleging *violation of his due process rights under the United States Constitution*.

c. Analysis

The law applicable to the defendants' motion to dismiss Count I, however, is not the law regarding the due process protections afforded state employees, but the law regarding the Eleventh Amendment immunity of the state and state officials to suits alleging violation of due process protections. As to Eleventh Amendment immunity,

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this [C]ourt that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte New York, 256 U.S. 490, 497 (1921); *see also Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1037 (8th Cir. 2002) (also quoting this statement from *Ex parte New York*, and citing in further support U.S. CONST. AMEND. XI; *Alden v. Maine*, 527 U.S. 706, 712-13 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996);and *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). "Section 1983 does not override Eleventh Amendment immunity." *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989), construing *Quern v. Jordan*, 440 U.S. 332 (1979)), *cert. denied*, 519 U.S. 1148 (1997). Because the State of Iowa is entitled to Eleventh Amendment immunity to suit by Kenyon, a citizen of this State, and § 1983 does not override that immunity, the Eleventh Amendment stands as an "insuperable bar to relief" on Kenyon's claim in Count I, and the court will grant the State of Iowa's motion to dismiss that count for failure to state a claim upon which relief can be granted. *Parnes*, 122 F.3d at 546; *Frey*, 44 F.3d at 671.[1]

[1]Indeed, the principles that the Eleventh Amendment provides the State of Iowa (continued…)

Next, the court must decide whether or not the Eleventh Amendment also bars Kenyon's § 1983 claim against Judge Wenell. "A state agency or official may invoke the State's Eleventh Amendment immunity if immunity will 'protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.'" *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1438 (8th Cir. 1996) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984)). However, state officials do not enjoy Eleventh Amendment immunity co-extensive with the State's immunity. As the Eighth Circuit Court of Appeals recently explained,

> *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), carves out an exception to that fundamental rule: state officials may be sued in their official capacities for prospective injunctive relief when the plaintiff alleges that the officials are acting in violation of the Constitution or federal law. *Id.* at 159-60, 28 S. Ct. 441; *see also Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). This exception exists to "preserve the constitutional structure established by the Supremacy Clause." *Antrican ex rel. Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002).

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[1](…continued)
with immunity to Kenyon's claim and that § 1983 does not abrogate that immunity are both so long-established that Kenyon's § 1983 claim against the State of Iowa is clearly frivolous. Under the circumstances, Kenyon's assertion of such a claim against the State of Iowa easily warranted sanctions under Rule 11 of the Federal Rules of Civil Procedure. However, counsel for the State of Iowa graciously declined to pursue such sanctions, instead expressing satisfaction with obtaining "clarity" on the issue of the State's immunity in this case and education of Kenyon's counsel concerning the issue. Although the court might have been inclined to be less lenient with such an obviously frivolous claim, at least where the plaintiff is represented by counsel, the court will defer to the State's counsel's desire to pursue the "high road."

Cross, 294 F.3d at 1037; *Hopkins v. Saunders*, 199 F.3d 968, 977 (8th Cir. 1999) ("The Eleventh Amendment protects a state official sued in his official capacity from all claims except for certain forms of prospective equitable relief, such as reinstatement.") (citing *Campbell v. Arkansas Dep't of Correction*, 155 F.3d 950, 962 (8th Cir. 1998)), *cert. denied*, 531 U.S. 873 (2000). Kenyon seeks damages in this case, but does not seek prospective injunctive relief, or any other equitable relief, such as reinstatement, so that this exception to immunity of a state official sued in his official capacity is not applicable. Moreover, "State officials in their official capacity are not persons amenable to suit under § 1983," *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 995 (8th Cir. 2001) (citing *Hafer v. Melo*, 502 U.S. 21, 26 (1991)), so that any "official capacity" suit pursuant to § 1983 that Kenyon has brought against Judge Wenell fails for this additional reason.

Nevertheless, Kenyon contends that his suit against Judge Wenell is not barred by the Eleventh Amendment, because he has sued Judge Wenell in his individual capacity. "'As a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment.'" *U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 939 (8th Cir. 2001) (quoting *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1131-32 (10th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002)), *cert. denied*, 536 U.S. 925 (2002); *Okruhlik v. University of Ark. ex rel. May*, 255 F.3d 615, 127 (8th Cir. 2001) ("Officials sued in their individual capacity for acts outside their official duties, however, are generally not entitled to Eleventh Amendment immunity, *see Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).").[2]

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[2]It is also true, as Kenyon argues, that in *Forrester v. White*, 484 U.S. 219 (1988), the United States Supreme Court held that a state judge was acting in his individual or "administrative" capacity when he terminated a court employee, a probation officer, and, (continued…)

Even where a state official is sued in his or her individual capacity, however, the "'Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest."'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), in turn quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)).

> The state is the real party in interest when the judgment is sought from the public treasury, when the judgment would interfere with public administration, or when the judgment would restrain or compel state action. [However,] [t]he fact that the state here has chosen to indemnify its officials does not make it the real party in interest.

Id. (internal citations omitted); *Okruhlik*, 255 F.3d at 127 ("[S]tate statutes that indemnify individuals from the consequences of carrying out their duties do not alone make the state the real party in interest. *See Griess v. Colorado*, 841 F.2d 1042, 1045-46 (10th Cir. 1988)."). Although the defendants contend that Judge Wenell is entitled to Eleventh Amendment immunity, because any judgment against him would be sought from the public treasury, it is not clear whether or not any judgment sought against Judge Wenell would be paid from the state treasury only because of the State of Iowa's decision to indemnify its officials. *See id.*; *Okruhlik*, 255 F.3d at 127. Therefore, the contention that the judgment may be sought against the public treasury does not stand as an "insuperable bar" to Kenyon's claim against Judge Wenell. *See Parnes*, 122 F.3d at 546 (a motion to dismiss pursuant to Rule 12(b)(6) should be granted only if there is some "insuperable bar"

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[2](…continued)
therefore, was not absolutely immune to suit under § 1983 for damages arising from his allegedly wrongful termination of the employee. *See Forrester*, 484 U.S. at 229-30. However, the "immunity" at issue in that case was "absolute judicial immunity," not Eleventh Amendment immunity. *Id.*

to the plaintiff's claim); *Frey*, 44 F.3d at 671 (same).

The problem here is that Kenyon's Complaint does not specify whether Judge Wenell is sued in his official or individual capacity. If a complaint does not specifically name a public official in his or her individual capacity, it is presumed that the official is sued only in his or her official capacity. *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998). As the Eighth Circuit Court of Appeals has explained,

> In *Egerdahl [v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995)], we held that if a complaint is silent, or only hints at the capacity in which a state officer is sued for monetary damages, the complaint should be interpreted as an official-capacity claim. *Id.* at 619. In actions against [public] officers, specific pleading of individual capacity is required to put public officials on notice that they will be exposed to personal liability, *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989); in addition, Fed. R. Civ. P. 9(a) requires a plaintiff to plead capacity to the extent necessary to show jurisdiction, and the Eleventh Amendment places a jurisdictional limit on actions against officers in their official capacities. *Nix*, 879 F.2d at 431.

Andrus ex rel. Andrus v. Arkansas, 197 F.3d 953, 955 (8th Cir. 1999). Because Kenyon's Complaint does not specifically plead the capacity in which Judge Wenell is being sued, *see id.*, and the court must, therefore, presume that he is being sued only in his official capacity, *see Artis*, 161 F.3d at 1182, the Eleventh Amendment bars a suit for damages against Judge Wenell in his official capacity. *Cross*, 294 F.3d at 1037; *Hopkins*, 199 F.3d at 977 ("The Eleventh Amendment protects a state official sued in his official capacity from all claims except for certain forms of prospective equitable relief, such as reinstatement.") (citing *Campbell*, 155 F.3d at 962). Kenyon's § 1983 claim against Judge Wenell consequently fails to state a claim upon which relief can be granted, and must be

dismissed. However, the court deems it appropriate that such dismissal be without prejudice to a motion to amend the Complaint to allege specifically the capacity in which Judge Wenell is being sued. *Cf. Artis*, 161 F.3d at 1182 (declining to permit the appellant to amend his complaint to add an individual-capacity claim against a school official, because he had ample time to seek amendment to his complaint before the district court, but failed to do so).

2. Indispensable parties challenge

a. Arguments of the parties

Because the court's dismissal of the § 1983 claim against Judge Wenell on Eleventh Amendment immunity grounds is without prejudice, the court will also consider the defendants' contention that Kenyon has failed to join necessary and indispensable parties in his § 1983 claim. The necessary and indispensable parties, the defendants contend, are the other six judges of Iowa's Judicial District 3B, because, under applicable law, Kenyon could only be removed by a majority vote of all of the judges of the district, not by a single judge. Kenyon, however, contends that he does not have to name all of the other judges who participated in his discharge hearing as "indispensable" parties, because their role was only passive. Judge Wenell, on the other hand, he argues, brought the misconduct charges against him and investigated the charges. He argues that, if Judge Wenell believes that the other six judges share liability with him, then he can join those judges as defendants in this action.

b. Analysis

Rule 19(a) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> **(a) Persons to be Joined if Feasible**. A person who is subject to service of process and whose joinder will not

> deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a). Rule 19(b) provides for dismissal for failure to join "indispensable" parties as follows:

> **(b) Determination by Court Whenever Joinder is not Feasible**. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). As the Eighth Circuit Court of Appeals has explained,

> Rule 19(b) authorizes a district court to exercise its equitable powers to dismiss an action if a party regarded as "indispensable" cannot be joined. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be

> determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). We therefore review a district court's decision to dismiss an action for failure to join an indispensable party under the highly deferential abuse- of-discretion standard. *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998).

Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 746 (8th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002). Although Rule 19(b) and *Spirit Lake Tribe* stand for the proposition that dismissal is appropriate when indispensable parties *cannot* be joined, it appears that, pursuant to Rule 19(a), when indispensable parties *can* be joined, but the plaintiff simply *has not* joined them, the appropriate remedy is to order the plaintiff to join the indispensable parties.

A number of cases stand for the proposition that, at least where injunctive or equitable relief is sought, and a single member of a board, body, council, or commission cannot act alone, the other members of the board, body, council, or commission are indispensable parties. *See, e.g., Russo v. Vacin*, 528 F.2d 27, (7th Cir. 1976) (suit was brought against city council members who had voted for a plan redrawing ward lines and other members of the city council were joined only because they were necessary parties for any injunctive relief); *Jalil v. Hampton*, 460 F.2d 923, 417 n.6 (D.C. Cir.) ("Insofar as the case involves Civil Service Regulations beyond the power of the chairman to change, acting by himself, there may be a requirement for joinder of the other members of the Commission."), *cert. denied*, 409 U.S. 887 (1972); *Zirin v. McGinnis*, 282 F.2d 113, 118 (3d Cir.) (in an action for judicial review of discharge of an employee of the IRS allegedly in violation of due process rights, the plaintiff was required to sue all of the individual members of the Civil Service Commission as indispensable parties), *cert.*

denied, 364 U.S. 921 (1960); *Adamietz v. Smith*, 273 F.2d 385, 387-88 (3d Cir.) (same), *cert. denied*, 363 U.S. 850 (1960). It is clear, as the defendants' argue, that in this case, Kenyon could only be "removed from office for cause by a majority vote of the district judges of the judicial election district." IOWA CODE § 602.1215. Therefore, had Kenyon been seeking equitable or injunctive relief from his allegedly wrongful dismissal, the other district judges would plainly be "indispensable" parties, and the appropriate remedy would be to order Kenyon to join them.

It is less clear that the other district judges of Iowa Judicial District 3B are "indispensable" parties, where Kenyon only seeks damages for his wrongful discharge, rather than any equitable relief, such as reinstatement, which might require further action of all of the judges. Nevertheless, the court concludes that the other judges are "indispensable" parties, because in their absence, Judge Wenell is prejudiced as the "scapegoat" for actions of the entire body of judges and/or would be required to bear damages in his individual capacity for actions that required a majority vote of all of the judges. *See* FED. R. CIV. P. 19(a) & (b).

Because the court is dismissing Count I without prejudice to allow Kenyon the opportunity to plead specifically the capacity in which Judge Wenell is sued, the court concludes that, for any amendment of the claim to be adequate, Kenyon must also name all of the other district judges as necessary and indispensable parties. Continued insistence that no other parties are necessary, however, would warrant dismissal or refusal of leave to amend. *Cf. Thaxton v. Vaughan*, 321 F.2d 474, 478 (4th Cir. 1963) (the appellate court had no need to decide whether the court had a duty to join as indispensable parties other members of the city council where the plaintiff refused to act to do so, but the failure to join those parties meant no relief could be granted).

C. The State Law Claim

In Count II of his Complaint, Kenyon asserts a claim, pursuant to the Iowa Tort Claims Act, of removal in violation of the standards and procedures set forth in IOWA CODE §§ 602.1215 and 602.1218 and certain personnel manuals. The defendants have also moved to dismiss this claim.

1. Arguments of the parties

The defendants contend that the Eleventh Amendment bars the claim in Count II of Kenyon's suit. In addition, they argue that this claim is subject to dismissal because, far from waiving Eleventh Amendment immunity to suit in federal court, the Iowa Tort Claims Act, IOWA CODE CH. 669, specifically waives immunity only for suit in the Iowa District Courts, and that this court has so held. Kenyon does not directly dispute the defendants' contentions. Rather, he asserts that this court should maintain jurisdiction over his Iowa Tort Claims Act claim, because his is a unique case in which this federal court is the only court that does not have a stake in the outcome of the litigation. He argues that every Iowa District Court, and every Iowa District Court Judge, has at least some stake in the litigation over dismissal of a Clerk of Court by District Judges, such that an appearance of bias in violation of judicial ethics is inevitable.

2. Analysis

First, for all of the reasons that the Eleventh Amendment bars Kenyon's § 1983 claim, it also bars his state law claim. Moreover, as the defendants contend, and Kenyon concedes, this court has already addressed the issue of waiver of Eleventh Amendment immunity for suit in federal court on a claim pursuant to the Iowa Tort Claims Act, in *Sophapmysay v. City of Sergeant Bluff*, 126 F. Supp. 2d 1180 (N.D. Iowa 2000). In *Sophapmysay*, this court found that "[t]he plain language of section 669.4 limits waiver of Iowa sovereign immunity to lawsuits [under the Iowa Tort Claims Act] brought in Iowa

state courts." *Sophapmysay*, 126 F. Supp. 2d at 1192. This court also concluded that "a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law." *Id.* at 1193. This court then concluded, as follows:

> As was noted above, a state's waiver of its Eleventh Amendment immunity will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *[Port Auth. Trans-Hudson Corp. v.] Feeney*, 495 U.S. [299,] 305, 110 S. Ct. 1868 [(1990)]. The Iowa State Tort Claims Act provides that Iowa state district courts have exclusive jurisdiction to determine any suit or tort claim under that act. Absent reference to either Eleventh Amendment immunity or suit in federal court, the court cannot find that § 669.4 provides an express waiver of Eleventh Amendment immunity to suits against the state in federal court. *See Angela R. [v. Clinton]*, 999 F.2d [320,] 325 [(8th Cir. 1993)] (the state statute "'must specify the State's intention to subject itself to suit in federal court,'" quoting *Atascadero State Hosp. [v. Scanlon]*, 473 U.S. [234,] 241, 105 S. Ct. 3142 [(1985)], and also citing *Feeney*, 495 U.S. at 306-08, 110 S. Ct. 1868, and *Burk v. Beene*, 948 F.2d 489, 493-94). As a result, the court cannot conclude that the State of Iowa has waived its Eleventh Amendment immunity in the Iowa State Tort Claims Act since that act does not expressly specify the state's intent to subject itself to suit in federal court. Therefore, this portion of defendants' motion to dismiss is granted[.]

Sophapmysay, 126 F. Supp. 2d at 1193. Kenyon's arguments do not require a different result here, because they cannot overcome Eleventh Amendment immunity or override the lack of any waiver of Eleventh Amendment immunity. Therefore, Kenyon's state-law claim will be dismissed.

III. CONCLUSION

Upon the foregoing, the defendants' July 28, 2003, Motion To Dismiss (docket no. 8) is **granted** as follows:

1. Counts I and II of the Complaint against the State of Iowa are **dismissed** on the basis of Eleventh Amendment immunity.

2. Counts I and II of the Complaint against Judge Wenell are also **dismissed** on the basis of Eleventh Amendment immunity. However, Count I against Judge Wenell is *dismissed without prejudice* to Kenyon's proffer of an amended claim of violation of his due process rights pursuant to 42 U.S.C. § 1983 specifying the capacity in which Judge Wenell is sued, joining all of the other District Judges of Iowa Judicial District 3B who participated in the determination that Kenyon should be terminated, and likewise specifying the capacity in which those judges are sued. Kenyon shall have **to and including October 15, 2003,** within which to proffer an amended complaint.

IT IS SO ORDERED.

DATED this 30th day of September, 2003.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA